THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF THE DECISION
CASE NUMBER 002/PUU-I/2003
REGARDING
THE PRIVATIZATION OF PETROLEUM AND NATURAL GAS

Petitioners : 1. APHI / *Asosiasi Penasehat Hukum and Hak Asasi Manusia Indonesia* (Indonesian Association of Legal and Human Rights Advisers) (Petitioner I);
2. PBHI/*Perhimpunan Bantuan Hukum and hak Asasi Manusia Indonesia* (Indonesian Association of Legal Aid and Human Rights) (Petitioner II);
3. *Yayasan* 324 (Foundation 324) (Petitioner III);
4. SNB/*Solidaritas Nusa Bangsa* (Motherland and Nation Solidarity) (Petitioner IV);
5. SP KEP – FSPSI Pertamina (Petitioner V); 6. Dr. Ir. Pandji R. Hadinoto, PE, M.H. (Petitioner VI).

Type of the Case : Review of the Law Number 22 of the Year 2001 regarding Petroleum and Natural Gas (the Law on Migas) against the Constitution of 1945.

Case of Lawsuit : Formal Review of the Law Number 22 of the Year 2001 regarding Petroleum and Natural Gas and Material Review of the Law Number 22 of the Year 2001 regarding Petroleum and Natural Gas is contrary to Article 33 section (2) and (3) of the Constitution of 1945.

Verdict :
- To declare the petition of the Petitioner VI not acceptable (*niet ontvankelijk verklaard*);
- To reject the petition of the Petitioners in the formal review;
- To grant the petition of the Petitioners in the material review for a part.

Date of the Decision : Tuesday, 21 December 2004.

Summary of the Decision :

The Petitioners are an LSM and/or community group growing up and developing independently, on their own wish and desire in the midst of the society, being active, interested in and established based on the concern to be able to render protection

and enforcement of Justice, Law and Human Rights, including the rights of workers in Indonesia.

The Petitioners filed for a formal and material review against the Law Number 22 of the Year 2001 regarding Petroleum and Natural Gas (the Law on Migas).

In the formal review, the Petitioners postulated that the Procedure of Approval to the Bill on Petroleum and Natural Gas to become the Law Number 22 of the Year 2001 was contrary to Article 20 section (1) of the Constitution of 1945 in conjunction with Article 33 section (2) letter a and section (5) of the Law Number 4 of the Year 1999 regarding the Structure and Position of the MPR (the People's Consultative Assembly), the DPR (the People's Representative Council) and the DPRD (the Regional People's Representative Council) in conjunction with the Decree of the DPR R.I. Number 03A/ DPR RI/1/2001-2002 regarding the Rules of Conduct of the DPR R.I.

In the material review, the Petitioners postulated that the Law on Migas is contrary to Article 33 section (2) and (3) of the Constitution of 1945 because the existence of the Law on Migas appears not to serve the principles of economy as referred to in Article 33 of the Constitution of 1945, so that it would result in difficulty for the Government to guarantee the prosperity and/or welfare of all the people of Indonesia ensuing in uncertainty in the actualization of the constitutional rights of the people as determined in Article 28H section (1) of the Constitution of 1945.

In its petitum, the Petitioners petitioned to the Assembly of the Constitutional Justices to examine and to decide on the Petition to Review by declaring to accept and to grant the whole petition to this review; declaring the Law Number 22 of the Year 2001 regarding Petroleum and Natural Gas contrary to Article 33 section (2) and (3) of the Constitution of 1945; declaring the Law Number 22 of the Year 2001 regarding Petroleum and Natural Gas to have no binding force; to rule the revocation of the promulgation of the Law Number 22 of the Year 2001 regarding Petroleum and Natural Gas in the State Gazette of the Republic of Indonesia and Supplement to the State Gazette of the Republic of Indonesia or at least to rule the placing of this petitum in the State Gazette of the Republic of Indonesia and Supplement to the State Gazette of the Republic of Indonesia.

The Constitutional Court opined that the Petitioners I up to V, regardless thereof that it could not be proven whether the aforementioned Petitioners hold the status of legal entity or not, nevertheless, based on the articles of association of the respective association having filed this petition (Petitioners I up to V) it appears that the objective of the aforesaid association was to struggle for the public interest of (public interests advocacy) implying therein the substance of the petition as such *(a quo)*, the Petitioners I up to V possess the legal standing as Petitioners in the petition as such *(a quo)*.

Furthermore the Constitutional Court opined that the Petitioner VI, DR. Ir. Pandji R. Hadinoto, PE., M.H. being the Vice Rector II of the Universitas Kejuangan 45, did not clearly explain the loss of his right and/or constitutional authority with regard

to his qualification as Deputy Rector II of the Universitas Kejuangan 45 due to the enactment of the Law as such *(a quo)*, so that no relationship of interest is apparent between the substance of the petition and the qualification of the Petitioner acting on behalf of the Universitas Kejuangan 45, and therefore the Court opined, regardless thereof that there were 2 (two) Constitutional Justices having a dissenting opinion, the Petitioner VI does not possess the legal standing as a petitioner before the Court in the petition as such *(a quo)*.

In order to prove the correctness of the postulate of the aforesaid Petitioner the Constitutional Court has examined the Proceedings of the 17th General Meeting of the 1st Term of Session of the DPR of the Year of Session 2001-2002, dated 23 October 2001, namely the general meeting which validated the Bill on Petroleum and Natural Gas to become the Law Number 22 of the Year 2001 regarding Petroleum and Natural Gas. In the aforementioned proceedings, the postulate of the Petitioner mentioning that there were 12 (twelve) Members of the DPR stating their disagreement against the Bill on Petroleum and Natural Gas by filing a *minderheidsnota* was correctly proven (*vide* the Proceeding pp. 70-74). Nevertheless, in the same proceeding, the Court also found a fact that at the final end of the aforementioned general meeting, while the whole fraction had conveyed its Final Opinion and the chair of the meeting (A.M. Fatwa) asked whether the Bill as such *(a quo)* could be agreed on for validation to become a law, the minutes noted that all the Members of the DPR agreed with no more statement of objection or disagreement, so that the chair of the meeting then proposed the representatives of the Government, the Minister of Energy and Mineral Resources, to convey his speech (*vide* Proceeding pp. 158).

Based on the Proceedings of the General Session dated 23 October 2001 which validated the Bill on Petroleum and Natural Gas to become a law, the written statement of the DPR as well as the verbal statement conveyed in the session, the Petitioners appeared not to being able to convince the Constitutional Court proofing the correctness of the postulate of their petition, so therefore the petition for formal review of the Petitioner against the Law as such *(a quo)* should be rejected.

Prior to examining the postulate of the Petitioners in the material review, the Constitutional Court explained several important terms in Article 33 section (2) of the Constitution of 1945 that states: “production branches important for the state and/or that control the livelihood of the people at large shall be controlled by the state”; and Article 33 section (3) of the Constitution of 1945 that states: “the land and waters and the natural wealth contained in it shall be controlled by the state and be utilized for the optimal welfare of the people.”

The term “shall be controlled by the state” should be understood as to include the meaning of controlled by the state in a broad meaning having its source in and derived from the concept of the Indonesian people’s sovereignty over all the sources of wealth: “the land and waters and the natural wealth contained in it”, also including

therein the term public ownership by the people's collective over the aforementioned sources of wealth. The people's collective is constructed by the Constitution of 1945 to render a mandate to the state to provide the policy of (*beleid*) and management actions (*bestuursdaad*), arrangements (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*) for the purpose of the optimal welfare of the people. The function of management action (*bestuursdaad*) by the state is conducted by the government by its authority to issue and to withdraw permit facilities (*vergunning*), licenses (*licentie*), and concessions (*consessie*). The arrangement function by the state (*regelendaad*) is conducted through the legislative authority of the DPR jointly with the Government and regulation by the Government. The management function (*beheersdaad*) is conducted through the mechanism of shareholding and/or through direct involvement in the management of State Owned Business Enterprises or State Owned Legal Entities as an institutional instrument, through which the State, *c.q.* the Government, makes use of its control over the sources of such wealth to be utilized for the optimal welfare of the people. So is also the function of supervision by the state (*toezichthoudensdaad*) conducted by the state, *c.q.* the Government, in the frame of supervising and controlling in order to execute control by the state over the aforementioned sources of wealth is truly conducted for the optimal welfare of the people.

In the frame of such term, control in the sense of private ownership having its source in the concept of public ownership with regard to production branches important for the state and that control the livelihood of the people at large which according to the provision of Article 33 section (2) shall be controlled by the state, depends on the dynamics of development of the condition of wealth of the respective production branch. Those to be controlled by the state are: (i) the production branches important for the state and control the livelihood of the people at large; or (ii) they are important for the state but do not control the livelihood of the people at large; or (iii) they are not important for the state but control the livelihood of the people at large. All the three shall be controlled by the state and be utilized for the optimal welfare of the people. Nevertheless, it is up to the Government jointly with the people's representative institution to assess what and when a production branch is deemed important for the state and/or controls the livelihood of the people at large. A production branch that is at one time important for the state and controls the livelihood of the people at large, at another time may turn to become not important for the state and/or does no longer control the livelihood of the people at large;

Based on such frame of thought, if the government and the DPR deem the production branch of petroleum and natural gas, which are also natural wealth contained in the land of Indonesia as referred to by Article 33 section (3) of the Constitution of 1945 no longer important for the state and/or does no longer control the livelihood of the people at large, then such production branch of petroleum and natural gas may well be given to the arrangement, management action, management, and supervision of the

market. Nevertheless, if the government and the DPR deem the aforesaid production branch still important for the state and/or controls the livelihood of the people at large, then the State, *c.q.* the Government, shall remain obliged to control the respective production branch by means of regulating, taking care of, managing, and supervising it in order to be indeed utilized for the optimal welfare of the people. The term control also includes the term private ownership as an instrument to retain the control level by the state, *c.q.* the Government, in the management of the aforementioned branch of petroleum and natural gas.

As such, the concept of private ownership by the state over shares in business enterprises concerning production branches important for the state and/or control the livelihood of the people at large cannot to be dichotomized or be alternated with the concept of arrangements by the state. Both are of cumulative nature and are included in the term of control by the state. Therefore, the state is not authorized to regulate or to determine regulations that prohibit itself from owning shares in a business enterprise concerning production branches important for the state and/or control the livelihood of the people at large as an instrument or means of the state to retain control over the aforementioned sources of wealth for the purpose of the optimal welfare of the people.

Besides, to guarantee the principle of efficiency with justice as referred to in Article 33 section (4) of the Constitution of 1945 that states: “The national economy shall be conducted by virtue of economic democracy under the principles of togetherness, efficiency with justice, sustainability, environment insight, autonomy, as well as by safeguarding the balance of progress and national economic unity”, then control in the sense of such private ownership must also be understood as being of relative nature in the sense that it does not need to be absolutely 100%, provided that control by the state *c.q.* the Government over the management of the aforesaid sources of wealth remains to be maintained as it should be. Although the Government only holds a relatively majority of shares, provided that it remain determining in the process of decision making over the determination of the policy of the respective business enterprise, then a divestment or privatization of ownership of the shares of the Government in the respective State Owned Business Enterprises cannot to be deemed to be contrary to Article 33 of the Constitution of 1945.

The Court opined, the provision of Article 33 of the Constitution of 1945 does not reject the idea of competition among the entrepreneurs, provided that such privatization would not eliminate control by the state *c.q.* the Government, to be the main policy maker of the business of production branches important for the state and/or control people at large. Article 33 of the Constitution of 1945 also does not reject the idea of competition among entrepreneurs, provided that such competition would not eliminate control by the state that includes the power for regulating (*regelendaad*), taking care of (*bestuursdaad*), managing (*beheersdaad*), and supervising (*toezichthoudensdaad*) production branches important for the state and/or control the livelihood of the people at large for the purpose of the optimal welfare of the people

The right to control of the state in Article 33 section (2) of the Constitution of 1945 does not mean to own, but the state as an organization is given the authority from which it becomes possible for rights to rise, like the right of management, right of cultivation. The right of the state to control in relation with petroleum and natural gas includes the right to regulate and to determine the legal status of management and the cultivation of petroleum and natural gas. In the Law Number 22 of the Year 2001, the control of the state is regulated related to the conduct of business activity of petroleum and natural gas consisting of upstream business and downstream business activities. A part of the authority of the state in the management and the business of petroleum and natural gas can be given to permanent business enterprises and business formats, while the arrangements and supervision over business activity of petroleum and natural gas shall remain with the Government as the holder of mining rights over petroleum and natural gas.

The Constitutional Court opined that the postulates submitted by the Petitioners are not sufficiently reasoned, so that it has not been proven either that the Law as such *(a quo)* as a whole is contrary to the Constitution of 1945. Because the substance of control by the state appears to be sufficiently clear in the flow of thought of the Law as such *(a quo)* in the upstream as well as the downstream sector, although according to the Court there are still matters where the aforesaid control guarantee by the state need to be ensured. The aforesaid matter is different from the Law on Electricity which had been reviewed by the Court by its Decision on the Case Number 001-021-022/PUU-I/2003 and read out on the date of 15 December 2004, which flow of thought regarding the principle of control of the state as aforementioned does not appear to have a clear elaboration in the articles of the aforesaid Law on Electricity which should become the first and main reference in accordance with the mandate of Article 33 of the Constitution of 1945. The difference in the aforementioned flow of thought has been reflected in the Consideration Clauses of both respective laws, which are then elaborated in the articles of both Laws as such *(a quo)*.

In its Decision, the Constitutional Court declared that the petition of the Petitioner VI was not acceptable (*niet ontvankelijk verklaard*); to reject the petition of the Petitioners in the formal review; to grant the petition of the Petitioners in the material review for a part, namely Article 12 section (3) to the extent regarding the wording “is given the authority”, Article 22 section (1) to the extent regarding the wording “the most”, and Article 28 section (2) and (3) of the Law Number 22 of the Year 2001 regarding Petroleum and Natural Gas to have no legal binding force; as well as to reject the remaining of the petition of the Petitioners. Furthermore, the Court ruled in order for this Decision Number 002/ PUU-I/2003 be contained in the Official Gazette the latest 30 business days as of this Decision was pronounced, namely on the date of 21 January 2005.